

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JUNE 28 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0068-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MICHAEL JOSEPH SCARPIGNATO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20021612

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Thomas Jacobs

Tucson
Attorney for Petitioner

P E L A N D E R, Chief Judge.

¶1 After a jury trial, petitioner Michael Scarpignato was convicted of possession of a dangerous weapon by a prohibited possessor, fleeing from a law enforcement vehicle, and resisting arrest.¹ The trial court sentenced him to aggravated terms of imprisonment with the sentence for the weapons misconduct conviction to be served consecutively to the other

¹The jury was unable to render a unanimous verdict on a count of first-degree murder charged in the the same case number. The court declared a mistrial as to that count alone, and Scarpignato was subsequently convicted on that murder charge after a second jury trial.

terms, which were to be served concurrently, for an aggregate term of nineteen years in prison. Aggravating circumstances identified by the court included Scarpignato's five prior felony convictions, three of which involved dangerous weapons; a prior revocation of probation; and a prior revocation of community supervision. On appeal, we modified Scarpignato's sentences and directed that all prison terms be served concurrently. We affirmed his convictions and sentences, as modified. *State v. Scarpignato*, No. 2 CA-CR 2003-0213 (memorandum decision filed Sept. 29, 2005).

¶2 Scarpignato filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and in his petition for post-conviction relief maintained he is entitled to be resentenced as a result of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). According to Scarpignato, these authorities preclude a trial court from relying upon the same prior convictions to enhance a sentence pursuant to A.R.S. § 13-604 and to impose an aggravated term pursuant to A.R.S. § 13-702(C)(11). In addition, Scarpignato argued that resentencing was also required because he had not previously been found in violation of community supervision, and this aggravating circumstance was therefore erroneous. And, Scarpignato alleged that trial counsel had been ineffective in failing to object to the court's reliance on the community supervision revocation as an aggravating circumstance and that appellate counsel was ineffective in failing to raise all of these issues on appeal. The trial court denied relief, and this petition for review followed.

¶3 In his petition for review, Scarpignato raises the same claims for relief. He contends the trial court had erred in relying on Scarpignato’s community service revocation as an aggravating circumstance and, therefore, was required to reweigh aggravating factors at a resentencing. We review a trial court’s denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

Alleged *Blakely* Error

¶4 The trial court has correctly stated Arizona law regarding the use of prior convictions at sentencing and the application of *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004), to Arizona sentencing decisions. We have held that “the legislature may authorize using the same fact or circumstance in more than one way as part of ‘a complex, multiple-step process’ by which trial courts determine the appropriate sentence for a particular crime, . . . but the authorization must be explicit and the specific factor expressly identified.” *State v. Alvarez*, 205 Ariz. 110, ¶ 8, 67 P.3d 706, 709 (App. 2003), *quoting State v. Bly*, 127 Ariz. 370, 373, 621 P.2d 279, 282 (1980). The legislature’s explicit authorization of the use of a prior conviction to both enhance a sentence and to impose an aggravated sentence within the enhanced range is found in former § 13-604(V)(2), now (W)(2), *see* 2003 Ariz. Sess. Laws, ch. 11, § 1; 2005 Ariz. Sess. Laws, ch. 188, § 1, and § 13-702(C)(11). Scarpignato does not articulate how the Supreme Court’s decision in *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536, would change this analysis. Although Scarpignato contends on review that, after *Blakely* was decided, “[l]ater decisions

established that . . . aggravating factors . . . could not be used for ‘double enhancement’ without Fifth Amendment protections against double jeopardy,” he fails to cite a single legal authority for this proposition. Like the trial court, we find no merit to Scarpignato’s claim, at least as stated here. *Cf. State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (failure to argue claim on appeal usually constitutes abandonment and waiver of claim).

Community Supervision Revocation as Aggravating Circumstance

¶5 In addressing Scarpignato’s claim that the trial court had erred in considering as an aggravating circumstance the fact that community service had previously been revoked, the court stated: “Even if one sets aside the factor of [Scarpignato’s] parole violation in 2001, there were several additional factors found by the court that appropriately warranted such a sentence.” Scarpignato’s petition for post-conviction relief was decided by the same judge who had sentenced him. Based on the trial court’s order, “the record clearly shows the trial court would have reached the same result even without consideration of the [arguably] improper factor[.]” *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989); *see also State v. Ramsey*, 211 Ariz. 529, n.7, 124 P.3d 756, 770 n.7 (App. 2005). Accordingly, the trial court did not abuse its discretion in ruling that no resentencing is required on this ground. *Id.*

Ineffective Assistance

¶6 The trial court also correctly ruled that Scarpignato failed to state a colorable claim for ineffective assistance of counsel. As the trial court reasoned, even if trial counsel erred by failing to object to allegedly inaccurate information regarding his prior completion

of community supervision, he failed to sustain his burden of establishing how he was thereby prejudiced, that is, how, in the absence of the alleged error, the result at sentencing would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984) (prejudice requires a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). Moreover, the trial court correctly concluded that because Scarpignato’s argument regarding the court’s use of prior convictions lacks merit, appellate counsel was not ineffective for failing to raise this issue on appeal. *See State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (to establish claim of ineffective assistance of appellate counsel, defendant must show counsel’s performance was deficient and, but for that deficiency, outcome on appeal would have been different).

¶7 We find no abuse of discretion in the trial court’s summary denial of post-conviction relief. Scarpignato has failed to state a colorable claim, and no purpose would be served by further proceedings. *See Ariz. R. Crim. P. 32.6(c)*. Accordingly, although we grant review, we deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge